IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION	§	
THIS DOCUMENT RELATES TO:	§	
All Cases	§	
MARK NEWBY, ET AL.,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO: H-01-3624 (Consolidated)**
ENRON CORPORATION, ET AL.,	§	
Defendants.	§	

MOTION TO COMPEL DEUTSCHE BANK ENTITIES TO RESPOND TO REQUESTS FOR PRODUCTION

Defendants Cindy Olson, Lawrence G. Whalley, Mark A. Frevert, Mark E. Koenig, and Steven J. Kean ("Officer Defendants") file this motion to compel Deutsche Bank Entities, and respectfully show the Court as follows:

I. Introduction

On August 21, 2003, the Officer Defendants served Deutsche Bank AG, Deutsche Bank Securities, Inc. (Successor of Deutsche Banc Alex Brown, Inc.), DM Alex Brown LLC and Deutsche Bank Trust Company Americas ("Deutsche Bank Entities") with Requests for Production of Documents (attached as Exhibit A). The responses to these Requests for Production were due September 22, 2003. So far, the Deutsche Bank Entities have not served any written response or produced any documents.

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The Deutsche Bank Entities take the unique position that, because they have a pending motion to dismiss, "the discovery stay imposed by the Private Securities Litigation Reform Act is still in effect with respect to Deutsche Bank" and, therefore, "written responses and objections to the document requests are not required and Deutsche Bank will not be producing responsive documents." *See* September 30, 2003 letter, attached as Exhibit B.

The Deutsche Bank Entities are mistaken. This Court lifted the PSLRA stay on April 24, 2003. *See* April 24, 2003, Order excerpts, attached as Exhibit C. The Court made no exceptions when it lifted the stay, even though it had previously recognized that an amended complaint would be filed and that additional motions to dismiss might follow. *See, e.g.,* January 27, 2003, Order, attached as Exhibit D. All other parties and even third parties are subject to discovery. The Deutsche Bank Entities should not be immune from discovery.

II. Discussion

The Officer Defendants requested four categories of data relating to Deutsche Bank Entities' customers' transaction and position data (*see* Exhibit A). The information requested from the Deutsche Bank Entities is necessary for the Officer Defendants' market and damage analyses.[1] Federal Rules of Civil Procedure 34 and 26(b) allow discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party . . ." FED. R. CIV. P. 26(b).

Rule 34(b) requires a "party upon whom the request is served [to] serve a written response within 30 days after the service of the request." FED. R. CIV. P. 34(b). When the Deutsche Bank Entities failed to serve any written response to the Officer Defendants' Requests for Production, the

[1] The documents sought are not PSLRA-protected merits discovery that can be avoided by the Deutsche Bank Entities, even if their motion to dismiss were to be granted by this Court.

Officer Defendants sent a letter to counsel for the Deutsche Bank Entities inquiring about the responses (*see* September 24, 2003 letter, attached as Exhibit E). On September 30, 2003, counsel for the Deutsche Bank Entities sent a letter to counsel for the Officer Defendants claiming that the Deutsche Bank Entities need not respond to the Requests for Production because the Private Securities Litigation Reform Act ("PSLRA") stayed all discovery as to them (*see* Exhibit B).

On April 24, 2003, this Court lifted the PSLRA discovery stay as to all discovery in the *Newby* consolidated cases (*see* April 24, 2003, Order excerpts, attached as Exhibit C). On July 11, 2003, this Court issued a Scheduling Order, which set various deadlines for discovery in the *Newby* consolidated cases (*see* July 11, 2003, Scheduling Order, attached as Exhibit F). Nowhere has the Court stated or even intimated that the PSLRA remains in effect for any parties. In fact, in various Orders on motions to dismiss that were entered *prior to* the filing of Plaintiffs' Amended Consolidated Complaint on May 14, 2003, this Court recognized that 1) Plaintiffs would file an Amended Consolidated Complaint; 2) more motions to dismiss would be filed by various parties; and 3) discovery would go forward in *Newby*. *See, e.g.,* January 27, 2003, Order (recognizing that Plaintiffs would amend their Complaint, several defendants would likely file a second motion to dismiss, but that "discovery [will] go forward in *Newby* . . ."), attached as Exhibit D, p. 2-3. However, the Deutsche Bank Entities claim that they somehow renewed the stay by filing a subsequent motion to dismiss (*see* Exhibit B). Other banks that the Officer Defendants served with similar document requests have not claimed that the PSLRA stay is still in effect. Further, various parties in this case have sought discovery from non-parties and the non-parties have responded. It cannot be that the PSLRA discovery stay has been "renewed" such that a *defendant* in the case may shield itself from discovery while *non-parties* must respond to various discovery requests. In fact,

if the Deutsche Bank Entities' motion to dismiss were to be granted, nothing in the PSLRA would protect the Deutsche Bank Entities, and the Officer Defendants could seek the same documents they currently seek via a Rule 45 subpoena.

The Officer Defendants, therefore, respectfully request that this Court order the Deutsche Bank Entities to produce documents responsive to the Officer Defendants' Requests for Production and hold that the PSLRA discovery stay has not been "renewed" as to any entity or party.

III. Prayer

FOR THESE REASONS, the Officer Defendants request that this Court order the Deutsche Bank Entities to produce documents responsive to the Officer Defendants' Requests for Production.

Respectfully submitted,

Jacks C. Nickens
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600 Travis, Suite 7500
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(713) 571-9191 (phone)
(713) 571-9652 (fax)

ATTORNEY IN CHARGE FOR DEFENDANTS CINDY OLSON, LAWRENCE GREG WHALLEY, MARK A. FREVERT, MARK E. KOENIG, and STEVEN J. KEAN

OF COUNSEL:

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CERTIFICATE OF CONFERENCE

When the Officer Defendants received no written response to their Requests for Production to the Deutsche Bank Entities, the Officer Defendants contacted counsel for the Deutsche Bank Entities and asked counsel to contact the undersigned so that the parties could work toward production. On September 30, 2003, counsel for the Deutsche Bank Entities responded that the Deutsche Bank Entities would not produce responsive documents, or serve responses and/or objections to the Officer Defendants' Requests for Production. Because the Deutsche Bank Entities are refusing to respond in any form to the Officer Defendants' Requests for Production, this Motion to Compel is necessary.

Paul D. Flack

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of November, 2003, he served a true and correct copy of the foregoing document on all counsel of record by posting said document in .PDF format to the http://www.esl3624.com website.

Paul D. Flack

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., individually And on behalf of all others Similarly situated,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
ENRON CORP., et al.,	§	
Defendants.	§	

PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES
ENRON CORP., an Oregon Corporation, ET AL.,	§	
Defendants.	§	

REQUESTS FOR PRODUCTION OF DOCUMENTS

TO: Deutsche Bank AG, Deutsche Bank Securities, Inc. (Successor of Deutsche Banc Alex Brown, Inc.), DM Alex Brown LLC and Deutsche Bank Trust Company Americas, by and through their attorney(s) of record, Mr. Joel Androphy, Berg & Androphy, 3704 Travis, Houston, Texas 77002.

INSTRUCTIONS

Pursuant to Rule 26 and 34 of the Federal Rules of Civil Procedure, the Officer Defendants ("Officer Defendants" refers to Cindy Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E.

EXHIBIT
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Koenig, and Steven J. Kean) hereby propound the following Requests for Production.

1. In responding to these requests, you shall produce all responsive documents which are in your possession, custody, or control or in the possession, custody, or control of your predecessors, successors, parents, subsidiaries, divisions, or affiliates, or any of your respective directors, officers, managing agents, agents, employees, attorneys, accountants, or other representatives. A document shall be deemed to be within your control if you have the right to secure the documents or a copy of the document from another person having possession or custody of the document.

2. In responding to these requests, you shall produce all responsive documents available at the time of production and you shall supplement your responses as required by Rule 26(e) of the Federal Rules of Civil Procedure.

3. Pursuant to the Federal Rules of Civil Procedure, you are to produce for inspection and copying by the Officer Defendants, original documents as they are kept in the usual course of business, or you shall organize and label them to correspond with the categories in these requests.

4. If any responsive document was, but is no longer in your possession or subject to your control, state whether it is (a) missing or lost; (b) destroyed; (c) transferred voluntarily or involuntarily to others; or (d) otherwise disposed of, and in each instance identify the name and address of its current or last known custodian, and the circumstances surrounding such disposition.

5. If any document responsive to these requests is withheld under a claim of privilege or upon any other ground, as to each such document, identify the privilege being asserted and provide the following information in sufficient detail to permit the court to rule on your claim:

a. the date, author, primary addressee and secondary addressee or persons

copied, and the relationship of those persons to the client and/or author of the document;

b. a brief description sufficient to identify the type, subject matter and purpose of the document;

c. all persons to whom its contents have been disclosed; and

d. the party who is asserting the privilege.

6. If a portion of any document responsive to these requests is withheld under claims of privilege pursuant to Instruction 5, any non-privileged portion of such document must be produced with the portion claimed to be privileged redacted.

7. You are to produce each document requested herein in its entirety, without deletion or excision (except as qualified by Instructions 5 and 6 above) regardless of whether you consider the entire document to be relevant or responsive to the requests.

8. The singular shall include the plural, and the disjunctive shall include the conjunctive, and vice versa.

9. "And" shall include the term "or," and the term "or" shall include the term "and," such that each document request calls for the production of the greatest number of documents.

10. "All" shall include the term "each" and vice-versa, as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside the scope of the request.

11. All information should be produced in electronic format.

12. If an identifier is used in place of an account number, that same identifier must be used for the account's trading and position data.

13. The same identifiers should be used for all Enron securities and options.

DEFINITIONS

1. "Enron" refers to Enron Corporation and each of its present and former predecessors, successors, subsidiaries, divisions, partnerships, limited partnerships, joint ventures, special purpose entities, and affiliates and each of their respective present and former officer, directors, employees, managing agents, partners, consultants, agents, representatives, attorneys, accountants, advisors, representatives and all other Persons acting or purporting to act on their behalf.

2. "Document" or "documents" have the same meaning as "documents," as used in FED. R. CIV. P. 34(a) and include, but are not limited to, "writings" as defined in FED. R. EVID. 1001 and any electronically stored documents, preliminary versions, drafts or revisions.

3. "Refer" or "relate" or "referring" means all documents which comprise, reflect, record, memorialize, embody, discuss, evaluate, consider, review or report on the subject matter of the request or were reviewed in conjunction with, or were created, generated or maintained as a result of the subject matter of the request.

4. "Electronic data" refers to any original and any non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting or any kind), of mechanical, facsimile, electronic, magnetic, digital or other programs (whether private, commercial, or work-in-progress), programming notes or instructions, activity listings of electronic mail receipts or transmittals, output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs and outlines, electronic mail or "e-mail," operating systems, source code of all types, programming languages, linkers and compilers, peripheral drives, PDF files, PRF files, batch files, ASCII files,

crosswalks, code keys, pull down tables, logs, file layouts or any miscellaneous files or file fragments, regardless of media on which they reside and regardless of whether said electronic data consists of an active file, back file, deleted file or file fragment. "Electronic data" also includes, without limitation, any items stored on computer memory or memories, hard disks, floppy disks, zip drives, CD-ROM discs, Bernoulli Boxes or their equivalents, magnetic tapes of any type or kind, microfiche, punched cards, punched tape, computer chips (including, without limitation, EPROM, PROM, ROM, or RAM of any kind) on or in any other vehicle for electronic or digital data storage or transmittal, files, folder tabs, or containers and labels appended to or associated with any physical storage device associated with each original and each copy.

5. "You" or "your" refers to the person or entity responding to these requests.

DOCUMENT REQUESTS

1. Please produce all information on every trade in Enron common stock and any other Enron securities or options executed by you during the period from January 1, 1998 until present.

For each trade, the information produced should include, but not be limited to:

a. trade date
b. account number (or other unique identifier)
c. dollar price (net of accrued interest, for bonds and notes)
d. volume (number of shares, or par amounts for bonds and notes)
e. direction (whether buy or sell and whether long or short)
f. cancellation code (if any)
g. account type (proprietary, institutional, retail, or state how account type can be determined from the account number)

2. Please produce all information on every settled position in Enron common stock and any other Enron securities or options on every day from January 1, 1998 to present.

Information requested should be produced for all accounts with a settled position, whether

or not the account had shares settling or pending settlement on the given date.

Information produced should include, but not be limited to:

a. date
b. account number (or other unique identifier)
c. position size
d. whether long or short

3. Please produce all information on deliveries and receipts of Enron common stock and other securities for transactions within accounts under your custody from January 1, 1998 to present.

For each delivery or receipt, the information produced should include, but not be limited to:

a. date
b. volume (number of shares or par amount of bonds and notes)
c. direction (delivery out or receipt in)
d. account number (or other unique identifier)
e. account type

4. Please produce all information on positions in Enron common stock and other securities for transactions within accounts under your custody from January 1, 1998 to present.

Information produced should include, but not be limited to:

a. date
b. account number (or other unique identifier)
c. position size (whether long or short)

Respectfully submitted,

Paul D Flack w/p JLW

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 21 day of August, 2003, he or she served a true and correct copy of the foregoing Request for Production of Documents on all counsel on the attached service list by posting said Requests for Production of Documents in .PDF format to the http://www.esl3624.com website.

Paul D Flack w/p JLW
Paul D. Flack

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THOMAS C. GRAHAM
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September 30, 2003

VIA FACSIMILE AND U.S. MAIL

Jessica L. Wilson, Esq.
Attorneys at Law
600 Travis Street, Suite 7500
Houston, Texas 77002

Re: In re Enron Corp. Securities, Derivatives & "ERISA" Litigation, MDL 1446

Dear Ms. Wilson:

We received your September 24, 2003 letter concerning document requests the "Officer Defendants" in Newby and Tittle purport to have served on the "Deutsche Bank Entities." As you know, in her December 20, 2002 decision, Judge Harmon dismissed in its entirety the Newby complaint as to Deutsche Bank. Although plaintiffs have re-pled their claims, Deutsche Bank's motion to dismiss the First Amended Consolidated Complaint is still pending. Accordingly, the Newby complaint (or, for that matter, any Enron related complaint) has yet to be upheld against Deutsche Bank and the discovery stay imposed by the Private Securities Litigation Reform Act is still in effect with respect to Deutsche Bank. No Deutsche Bank entities are named in the Tittle action. Based on the foregoing, written responses and objections to the document requests[1] are not required and Deutsche Bank will not be producing responsive documents.

Very truly yours,

Thomas C. Graham

[1] Deutsche Bank expressly reserves the right to assert any, and all, objections, if appropriate, in the future.

EXHIBIT
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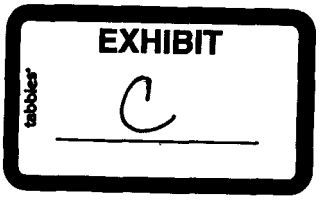
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
VS.	§	
KENNETH L. LAY, ET AL., Defendants.	§	

MEMORANDUM AND ORDER RE

REMAINING ENRON INSIDER DEFENDANTS

The above referenced putative class action, brought on behalf of purchasers of Enron Corporation's publicly traded equity and debt securities during a proposed federal Class Period from October 19, 1998 through November 27, 2001, alleges securities violations



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As is the case with Lay, the complaint identifies numerous allegedly false and misleading statements made by Skilling, as well as financial and registration statements that he signed, which the Court does not find it necessary to list. These provide a basis for Lead Plaintiff's claims against Skilling under § 10(b) and §11. Skilling's alleged trading in violation of his duty to disclose also constitutes a violation of § 11. Given his positions and power to control, the Court further finds that Lead Plaintiff has stated claims for controlling person liability under § 20(a) and § 15. Thus the Court finds that Lead Plaintiff has stated claims under these provisions against Skilling.

Accordingly for the reasons stated *supra*, the Court

ORDERS that Lead Plaintiff shall supplement or amend its complaint as indicated in this and prior orders and shall file a copy of the Powers Report within twenty days of entry of this order or inform the Court of any claims it no longer wishes to pursue against any and all Defendants. Conditioned upon that amendment/supplementation, the Court further

ORDERS that

(1) Ken L. Harrison's motion to dismiss (#621) is DENIED;

(2) Lou Pai's motion to dismiss(#624) is DENIED;

(3) Richard B. Buy's motion to dismiss(#637) is DENIED;

(4) Joseph M. Hirko's motions to dismiss (duplicatively filed as#639, #685) are GRANTED;

(5) Kenneth D. Rice's motion to dismiss (#640) is DENIED;

(6) Richard A. Causey'S motion to dismiss (#642) is DENIED;

(7) Jeffrey McMahon's motion to dismiss (#644) is DENIED;

(8) James V. Derrick, Jr.'s motion to dismiss (#649) is GRANTED;

(9) Kevin P. Hannon's motion to dismiss (#655) is DENIED;

(10) Kenneth L. Lay's motion to dismiss (#683) is DENIED; and

(11) Jeffrey K. Skilling's motion to dismiss (#718) is DENIED. The Court further

ORDERS that the discovery stay under the PSLRA is hereby LIFTED. Lead Plaintiff shall confer with counsel for all parties and submit a joint proposed schedule for discovery in *Newby* and *Tittle* and for any additional briefing related to class certification in *Newby* or, if necessary, request a hearing before the Court to establish one. The Court will set a class certification hearing after reviewing that briefing.

SIGNED at Houston, Texas, this 23rd day of April, 2003.

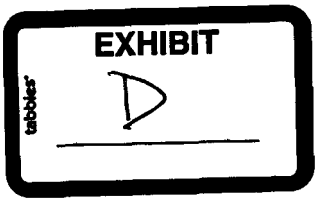
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

ORDER

Pending before the Court in *Newby* are Motions for Section 1292(b) Certification for Immediate Appeal of this Court's December 20, 2002 memorandum and order (#1194) filed by Defendants the Secondary Actor Bank Defendants (#1220), Merrill Lynch & Co. (#1212, supplemented by #1229), and Vinson & Elkins (#1227). Merrill Lynch's motion alternatively requests reconsideration of that memorandum and order by the Court. Also before the Court is a letter dated January 14, 2003 from counsel for the Regents of the University of California requesting a prompt status and scheduling conference.



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To provide the parties with some direction, the Court addresses the letter first. The Court has been working intently on the motions to dismiss in *Newby* and expects to have rulings on all of them shortly. Until then, the request for a status and scheduling conference appears both premature and impractical for the following reasons.

It makes no sense to establish a schedule, including for amendment of pleadings, without knowing all that needs to be done. The Court has already indicated in its recent memorandum and order that Lead Plaintiff will need to amend or supplement its complaint if it seeks to state a claim against Merrill Lynch & Co., and the Court continues to find additional claims against individual defendants that require more specific factual support to survive. Furthermore, in conjunction with the individuals' motions to dismiss, the Court will resolve the Joint Motion of Certain Defendants to Strike the Pulsifer Class Action Complaint (#1042) and the related issue of whether Lead Plaintiff should include those claims in an amended or supplemented pleading. Lead Plaintiff also asks whether it should add the subsidiaries of the bank Defendants to an amended or supplemental complaint. The Court indicated in its memorandum and order that if the banks object to being named defendants because a subsidiary or other entity was the real party in interest, they should file appropriate motions. The bank Defendants should do so now, and Lead Plaintiff should file its responses as quickly as possible, so that all amendment or supplementation can be efficiently and

timely accomplished in one instrument. In addition, Lead Plaintiff states that it seeks to add Enron Corporation as a defendant here if the bankruptcy court lifts the automatic stay; perhaps Judge Gonzales will have made a ruling on the question within the next couple of weeks.

The Court reassures the parties, however, that it will permit discovery to go forward in *Newby* and *Tittle* as soon as the *Newby* motions to dismiss have been resolved, without having to await a ruling on those pending in *Tittle.*

Merrill Lynch asks the Court to reconsider its denial of Merrill Lynch's motion to dismiss. This Court emphasizes that it granted Lead Plaintiff leave to amend its complaint expressly "in the interests of justice" and conditionally denied Merrill Lynch's motion to dismiss *provided* that Lead Plaintiff did amend. Fed. R. Civ. P. 15(a) (". . . [L]eave shall be freely given when justice so requires."). If Lead Plaintiff does amend to assert claims against Merrill Lynch, Merrill Lynch will then have an opportunity to challenge the adequacy of that new pleading through another motion to dismiss, if it so chooses. Thus the Court finds no prejudice to Merrill Lynch and denies the motion to reconsider. Moreover, for the same reasons, it finds Merrill Lynch's motion for Section 1292(b) certification to be premature.

The other Secondary Actors request certification by this Court for appeal of the denials of their motions to dismiss. A denial of a motion to dismiss is not a final order entitled to appeal as of right. *Louisiana Ice Cream Distributors, Inc. v.*

Carvel Corp., 821 F.2d 1031 (5th Cir. 1987). Title 28 U.S.C. § 1292(b) provides,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal shall not stay proceedings in the district court unless the district judge of the Court of Appeals or a judge thereof shall so order.

This provision gives district courts "first line discretion" to certify for immediate appeal interlocutory orders deemed "pivotal and debatable" that do not fall within the three categories of immediately appealable interlocutory orders listed in 28 U.S.C. § 1292(a), creating a narrow exception to the general rule limiting review to "final decisions" under 28 U.S.C. § 1291. *Swint v. Chambers County Commission*, 514 U.S. 35, 45-46 (1995). To warrant certification for appeal, Movants must show the denials of their motions to dismiss satisfy three conditions: (1) The issue must involve a controlling issue of law; (2) there must be a substantial ground for difference of opinion regarding that issue of law; and (3) the immediate appeal must appear to materially advance the ultimate termination of the litigation. *Whaley v. U.S.*, 76 B.R. 95, 96 (Bankr. N.D. Miss. 1987).

This Court emphasizes that its interlocutory denials of motions to dismiss in *Newby* are not based on substantive law nor on the merits of the claims, but on pleading standards. This Court further notes that the issue is not one of immunity from suit. As the Supreme Court made very clear in *Central Bank*,

> The absence of §10(b) aiding and abetting liability does not mean that secondary actors in securities markets are always free from liability under the securities Act. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met. . . . . In any complex securities fraud, moreover, there are likely to be multiple violators . . . .

Id. at 191. There are issues here not only of law, but of fact.

The second condition has clearly been met here. The Court and the parties acknowledge that there is a wide division of opinion among federal appellate and district courts regarding pleading a *prima facie* case of liability under § 10(b), the PSLRA, and *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), and obviously there is substantial ground for these differences.

The third prong, however, has not been satisfied. Not only does this Court find that appeals to the Fifth Circuit will not materially advance the ultimate termination of this multi-district litigation, but they would seriously obstruct the progress of a very large, complex, and most likely lengthy action

over which this Court has endeavored to impose orderly proceedings and which it seeks to move efficiently toward resolution or trial.[1] Even if Defendants request and receive expedited consideration, in light of the magnitude of this consolidated action and the unsettled state of the law this Court's experience leads it to believe that any appellate review of the law and the facts will not be rapid. Moreover, because this is a multidistrict litigation, many of the consolidated member suits arose in other Circuit Courts of Appeals, which have different standards for pleading securities violations and to which the individual suits will be returned for trial, if they are to be so resolved. Thus the Fifth Circuit's determination of the questions may not be controlling. Indeed division among the courts is so substantial that either a ruling by the Supreme Court or action by Congress appears necessary to resolve the differences.

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[1] The Court observes that even with respect to the narrow, collateral-order exception to the final judgment order doctrine embodied in § 1291 (i.e., the exception for interlocutory orders that "finally determine claims of right separable from and collateral to rights asserted in the action [and that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated"), the avoidance of suit merely because of cost to the litigants is not appropriate. Although "[i]t is always true . . . that 'there is a value . . . in triumphing before trial rather than after it,'" the Supreme Court has "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 497-99 (1989)(*citing United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985)).

Thus the Court, in its discretion, finds that appeals of the motions to dismiss are not warranted and

ORDERS that the motions for Section 1292(b) certification for immediate appeal are DENIED. It further

ORDERS that Merrill Lynch's motion to reconsider is DENIED.

SIGNED at Houston, Texas, this 23rd day of January, 2003.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

[redacted]

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Direct Dial (713) 353-6691

September 24, 2003

Via Certified Mail Return Receipt Requested
Mr. Joel Androphy
Berg & Androphy
3704 Travis Street
Houston, Texas 77002

Re: C.A. No. H-01-3624; *Mark Newby, et al. v. Enron Corp., et al*; In the United States District Court for the Southern District of Texas, Houston Division.

C.A. No. H-01-3913; *Pamela M. Tittle, et al. v. Enron Corp., et al.*; In the United States District Court for the Southern District of Texas, Houston Division.

Dear Mr. Androphy:

Enclosed please find requests for production that we served on the Deutsche Bank Entities on August 21, 2003. We have received no response. Please let me know when Deutsche Bank will be producing the requested documents. As stated in our prior cover letter, we are willing to work with Deutsche Bank to lessen any burden imposed by these requests. If we do not hear from you by September 30, 2003, we will seek relief from the court.

Very truly yours,

Jessica L. Wilson

JLW:mlc
Enclosures
16858v1

RECEIPT
7112 0347 6090 0000 0426

FROM:
Ms. Jessica L. Wilson
RE: 9/24-Ltr.to.Mr. Androphy

DP:
PB:

SEND TO:
Mr. Joel Androphy
Berg & Androphy
3704 Travis Street
Houston TX 77002

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EXHIBIT
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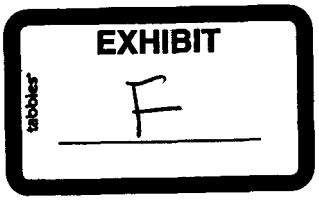
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§	MDL 1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, ET AL., Plaintiffs VS. ENRON CORP., an Oregon Corporation, ET AL., Defendants.	§	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES
AMERICAN NATIONAL INSURANCE COMPANY, ET AL., Plaintiffs, VS. ARTHUR ANDERSEN LLP, ET AL., Defendants.	§	CIVIL ACTION NO. G-02585
AMERICAN NATIONAL INSURANCE COMPANY, ET AL., Plaintiffs, VS. CITIGROUP, INC., ET AL, Defendants.	§	CIVIL ACTION NO. G-02-723



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MARY PAIN PEARSON, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-02-3786
	§	
ANDREW S. FASTOW, ET AL.,	§	
	§	
Defendants.	§	
FRED A. ROSEN, ET A;.	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-02-3787
	§	
ANDREW S. FASTOW, ET AL.,	§	
	§	
Defendants.	§	
HAROLD AHLICH, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-02-3794
	§	
ARTHUR ANDERSEN LLP, ET AL.	§	
	§	
Defendants.	§	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ENRON CORPORATION,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-02-3939
	§	
ANDREW S. FASTOW, ET AL.,	§	
	§	
Defendants.	§	

SCHEDULING ORDER

Having reviewed the submissions of counsel and heard counsel's views on scheduling at the conference on July 10, 2003, the Court emphasizes that the purpose of multidistrict litigation is to establish a discovery process that is orderly, efficient, focused, and observant of the rights of all litigants to

investigate the facts relevant to their claims. In such a massive litigation as this, some otherwise valid arguments for expedited proceedings or individualized treatment necessarily must be trumped by the need for systematic, nonduplicative, coordinated discovery. After careful consideration, the Court

ORDERS that the following schedule is now in effect.

I. Consolidated/Related/Coordinated Cases (those not currently proceeding under the controlling *Newby* and *Tittle* consolidated complaints)

A. Counsel for those Plaintiffs who **at this time** have decided to proceed under the *Newby* or *Tittle* consolidated amended complaints instead of under their own petitions/complaints shall file a statement to that effect and move to dismiss their own petitions/complaints within two weeks from entry of this order.

B. All other suits shall be **stayed as to the filing of amended pleadings and/or responsive pleadings** until the motions for class certification in *Newby and Tittle* are resolved by the Court, **but discovery may proceed.**

C. **Once the Court has ruled on the class certification motions, Plaintiffs** in each

remaining consolidated/related/coordinated suit **shall within two weeks of entry of the relevant class certification order either (1) elect whether to proceed under the consolidated amended complaint in *Newby* or *Tittle*, or both if appropriate, and dismiss their initial petitions/complaints or (2) file a statement that they will proceed under their own petitions/complaints, or request leave to amend their own pleadings.**

D. Defendants shall **file any amended responsive pleadings within 30 days** of the filing of such an amended complaint. Plaintiffs' replies shall be filed within 30 days of the filing of motions to dismiss.

E. **IN ALL AMENDED PLEADINGS, COUNSEL SHALL NOT REITERATE ALLEGATIONS OR ARGUMENTS PREVIOUSLY REJECTED BY THIS COURT IN RULINGS ON MOTIONS TO DISMISS THE CONSOLIDATED COMPLAINTS.**

F. Discovery shall proceed in accord with the schedule established below for *Newby* and *Tittle*. Plaintiffs' counsel shall work with Lead Counsel in *Newby* and *Tittle* to establish a procedure for participation in that discovery to avoid duplication of discovery

sought by Lead Counsel in *Newby* and *Tittle* shall serve as the base line and shall be presumptively adequate; counsel for the consolidated/related/coordinated cases shall avoid duplicative or overlapping document requests and must show *Newby* or *Tittle* Lead Counsel, and only if necessary the Court, that their additional or supplemental requests are for relevant materials that are new and/or unique to their claims. All counsel shall comply with the format established previously in *Newby* and *Tittle* for documents to be deposited in the central depository. Lead Counsel for *Newby* and *Tittle* shall circulate and discuss with counsel for the consolidated/related/ coordinated actions any stipulated proposals such as the protocol proposal for depositions or the proposal relating to confidentiality concerns.

II. *Newby* and *Tittle*

A. *Newby* Class Certification

1. Discovery deadline . . . **Sept. 15, 2003.**[1]

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[1] The Court denies Mr. Lerach's request to rule on class certification issues before deposing class representatives, but urges counsel to work together to reduce the cost by having a few representative counsel attend the depositions and ask non-redundant questions submitted by co-counsel, as suggested by Ms.

2. Defendants' Responses to Motion for Class Certification . . . . . **Oct. 16, 2003.**

3. Lead Plaintiff's Reply . **.Nov. 17, 2003.**

B. *Tittle* Plaintiffs may move to supplement class certification briefing after the Court rules on the motions to dismiss, if appropriate.

C. General Discovery

1. **Document production** shall be substantially completed by **Oct. 1, 2003.**

2. **Depositions shall not be taken before January 10, 2004 without court approval** based on a showing of need.

3. Deadline for **joining new parties or filing third-party complaints or cross complaints** is **January 10, 2004.** New parties must produce documents within 30 days after denial of any motions to dismiss.

4. **Fact discovery** shall be completed by **Dec. 17, 2004.**

5. **Plaintiffs' expert witnesses** named and their comprehensive opinion reports furnished by **January 7, 2005.**

Patrick.

6. **Defendants' expert witnesses** named and their comprehensive opinion reports furnished by **February 25, 2005.**

7. **Plaintiffs' rebuttal expert witnesses** named and their comprehensive opinion reports furnished by **March 15, 2005.**

8. **Expert discovery** completed by **April 15, 2005.**

9. **Motions for summary judgment** may be filed up to **May 2, 2005.**

   a. **Opposition to a motion for summary judgment filed before April 15, 2005** are due **45 days** after the date the motion is filed.

   b. **Opposition to a motion filed after April 15, 2005** is due by **July 1, 2005.**

   c. All **replies** are due **30 days** after the opposition is filed.

10. **Joint Pretrial Orders** in *Newby* and *Tittle* shall be filed by **September 15, 2005.**

11. **Pretrial Conference** at **1:30 p.m. on Oct. 3, 2005.**

12. **Trials** begin on **October 17, 2005 at 9:00 a.m.**

The Court will address the motions to remand as soon as it issues its decision on the *Tittle* motions to dismiss,

In light of this order, the Court

ORDERS that the following motions are MOOT: (1) American National Insurance Company *et al.*'s motion to lift stay in G-02-299, G-02-0723, G-03-0463, and H-03-1276 to allow participation in discovery (#1545 in *Newby*); and (2) UBS Painewebber, Inc. and UBS Warburg LLC's motion to stay related NASD arbitration (#53 in member case H-02-851, *Lamkin et al. v. UBS Painewebber, Inc. et al.*). The Court also

ORDERS that the agreed motion (#1544) for briefing schedule relating to Bank Defendants' motions to dismiss is GRANTED.

Finally, the Court commends counsel's professional conduct thus far in resolving with commitment, hard work, and creativity the many difficulties of moving this complex litigation forward. The Court is confident that with such dedication continuing, these cases can be litigated in a orderly manner with all parties having a fair day in court.

SIGNED at Houston, Texas, this 11th day of July, 2003.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE